

OFFICE OF THE GENERAL COUNSEL

M E M O R A N D U M

TO: Chief, Dockets Division

FROM: Associate General Counsel, Litigation Division

SUBJECT: Time Warner Entertainment Company, L.P. v. FCC & USA, No. 94-1035. Filing of a new Petition for Review in the United States Court of Appeals for the District of Columbia Circuit

DATE: February 7, 1994

Docket No(s). MM 92-264

File No(s).

RECEIVED

FEB 14 1994

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

This is to advise you that on January 14, 1994, Time Warner Entertainment Company, L.P., filed with the United States Court of Appeals for the District of Columbia Circuit a:

X Section 402(a) Petition for Review  
\_\_\_\_\_ Section 402(b) Notice of Appeal

of the following FCC decision: In the Matter of Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992, FCC 93-456, released October 22, 1993. Challenge to the provision of Section 11(c) which grants the Commission the power to impose limitations on the degree to which multichannel video programming distributors may engage in the creation or production of video programming.

Due to a change in the Communications Act, it will not be necessary to notify the parties of these filing.

The Court has docketed this case as No. 94-1035 and the attorney assigned to handle the litigation of this case is Jim Carr.

Daniel M. Armstrong

cc: General Counsel  
Office of Public Affairs  
Shepard's Citations

*Jan*

United States Court of Appeals  
For the District of Columbia Circuit

**FILED JAN 14 1994**

**RON GARVIN  
CLERK**

In The  
UNITED STATES COURT OF APPEALS  
DISTRICT OF COLUMBIA CIRCUIT

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TIME WARNER ENTERTAINMENT COMPANY,  
L.P.

Petitioner

-against-

FEDERAL COMMUNICATIONS COMMISSION and  
UNITED STATES OF AMERICA,

Respondents.

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No.

**94-1035**

PETITION FOR REVIEW

Pursuant to 47 U.S.C. § 402(a) and 28

U.S.C. §§ 2342 and 2344, Time Warner Entertainment Company,  
L.P. ("TWE"), hereby petitions this Court for review of the  
Second Report and Order of the Federal Communications  
Commission ("the Commission") in MM Docket No. 92-264. The  
Second Report and Order, FCC No. 93-456 (the "Report and  
Order"), was adopted on September 23, 1993, released on  
October 22, 1993, and published in the Federal Register on  
November 15, 1993, in an abbreviated version.

A copy of the Commission's Report and Order is  
attached to this Petition as Exhibit A.

Venue

Venue in this Court is proper under 28  
U.S.C. § 2343. This petition is timely filed under 28  
U.S.C. § 2344.

Petitioner

TWE is majority owned and fully managed by Time Warner Inc. ("TWI"), a publicly traded company. TWE consists principally of three unincorporated divisions: Time Warner Cable ("TWC"), which operates cable systems; Home Box Office ("HBO"), which wholly owns two premium television services (the HBO service and Cinemax), and is 50% owner of one non-premium service (Comedy Central); and Warner Bros., which produces and distributes motion pictures and television programs. TWE and TWI also directly and indirectly hold minority interests in various non-premium cable programming services other than those owned by HBO.

TWC and HBO are the TWE divisions most affected by § 11(c) of the Cable Television Consumer Protection and Competition Act of 1992 (the "1992 Cable Act"), 47 U.S.C. § 533. TWE through TWC and affiliated companies owns and operates cable systems in approximately 1,600 franchise areas throughout the United States and through HBO and other affiliates has an interest in several cable programming services. As a result, TWC and its divisions, and HBO and

other programming vendors in which TWE or TWI has an interest, are directly affected by the Commission's rules limiting the number of subscribers that a cable operator can reach (the "subscriber limits") and limiting the number of channels that can be occupied by video programmers in which a cable operator has an attributable interest (the "channel occupancy limits"). TWE also seeks review of the provision of § 11(c) which grants the Commission the power to impose "limitations on the degree to which multichannel video programming distributors may engage in the creation or production of video programming". 47 U.S.C. § (f)(1)(c).

Injury Caused by the Second Report  
and Order

Petitioner seeks review of the Commission's Second Report and Order in MM Docket No. 93-456 in which the Commission adopts rules and regulations that implement § 11(c) of the 1992 Cable Act (subscriber and channel occupancy limits).

Petitioner is aggrieved by and suffers injury from the Commission's Second Report and Order on several bases:

(1) Section 11(c) of the 1992 Cable Act, 47 U.S.C. § 533(f)(1)(A), which directs the Commission to establish subscriber limits, impermissibly infringes on Petitioner's First Amendment rights. Specifically, the

subscriber limits directly affect cable operators' speech by limiting the number of persons with whom a cable operator can communicate. The subscriber limits are not justified by a compelling or substantial governmental interest and are not properly tailored to serve any permissible governmental interest.

(2) Section 11(c) of the 1992 Cable Act, 47 U.S.C. § 533(f)(1)(B), which directs the Commission to establish channel occupancy limits, impermissibly infringes on Petitioner's First Amendment rights. Specifically, the channel occupancy limits constitute a content-based restriction which directly interferes with a cable operator's editorial judgment by limiting the number of vertically integrated services that a cable operator may offer. They also interfere with the ability of vertically integrated cable programmers to disseminate their speech. The channel occupancy limits are not justified by a compelling or substantial governmental interest and are not properly tailored to achieve any permissible governmental interest.

(3) Section 11(c) of the 1992 Cable Act, 17 U.S.C. § 533(f)(1)(C), which directs the Commission "to consider the necessity and appropriateness" of establishing limitations on the creation or production of video

programming by multichannel distributors, impermissibly infringes on Petitioner's First Amendment rights. Although the Commission determined not to impose such limitations at the present time, the grant of such authority to the Commission is unconstitutional. This provision is not justified by a compelling or substantial governmental interest and is not properly tailored to achieve any permissible governmental interest.

(4) Because the underlying and enabling legislation is unconstitutional ab initio, the Commission lacks the power to promulgate the regulations at issue.

(5) By establishing regulations pursuant to § 11(c), the Commission has furthered the injury to Petitioner's First Amendment rights under a patently impermissible regulatory scheme.

#### Relief Requested

TWE challenged Section 11(c) and various other provisions of the 1992 Cable Act and the Cable Communications Policy Act of 1984 (the "1984 Cable Act") in the United States District Court for the District of Columbia. Time Warner Entertainment Company, L.P. v. FCC, 835 F.Supp. 1 (D.D.C. September 16, 1993). In its decision, the District Court held that the channel occupancy limits were constitutional but that the subscriber limits were not.

On November 12, 1993, TWE appealed to this Court the District Court's decision declaring constitutional the provisions of § 11(c) regarding channel occupancy limits and program creation and other provisions of the 1992 Cable Act and the 1984 Cable Act. Time Warner Entertainment Company, L.P. v. FCC, No. 93-5350 (D.C. Cir. filed November 12, 1993). Respondents appealed to this Court the District Court's decision declaring unconstitutional § 11(c) regarding subscriber limits and other provisions of the 1992 Cable Act. Time Warner Entertainment Company, L.P. v. FCC, No. 93-5349 (D.C. Cir. filed November 12, 1993). In the Report and Order, the Commission stayed the effective date of the subscriber limit regulations "until final judicial resolution of the District Court's decision". See Report and Order at ¶ 3 and n.5. The grounds for TWE's challenge on appeal to this Court are the same that would be raised in this Petition for Review, since TWE in this Petition challenges the Report and Order (and the accompanying Regulations) based only on the unconstitutionality of the underlying enabling legislation. TWE files this Petition as a protective appeal in view of the assertion by defendants in Time Warner Entertainment Company, L.P. v. FCC that the only appropriate method to challenge the constitutionality of statutory sections involved in the FCC rulemaking process

is by appeal from the FCC's Reports and Orders in those proceedings. See Telecommunications Research and Action Ctr. v. FCC, 750 F.2d 70, 74 (D.C. Cir. 1984). TWE disagrees with that view.

WHEREFORE, being aggrieved by the Commission's Second Report and Order in MM Docket No. 92-264 implementing § 11(c) which unconstitutionally infringes on Petitioner's First Amendment rights, Petitioner respectfully requests that this Court:

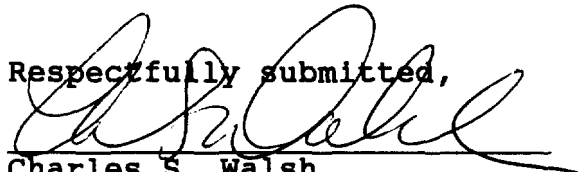
1. vacate and set aside the Commission's Second Report and Order;
2. declare unconstitutional § 11(c) of the 1992 Cable Act; and



3. grant such other and further relief as may be just and proper.

Dated: January 14, 1994

Respectfully submitted,



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